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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE and CASUALTY COMPANY
Appellant,

vs.

LLOYD M. CRENSHAW,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE INSURANCE CONSUMER ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF APPELLEE

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BRIEF OF THE INSURANCE CONSUMER ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

With the consent of the parties, the Insurance Consumer Action Network respectfully submits this brief as *amici curiae* in support of appellee. Copies of letters of both parties confirming this consent have been filed with this court.

The Insurance Consumer Action Network (ICAN) is a non-profit, non-partisan organization formed by California consumers to assist policyholders and claimants get insurance claims paid, and to provide public education on claim filing, underwriting and premium setting. ICAN also represents consumers at the California legislature and with the Department of Insurance.

ICAN files this brief because it is concerned that the elimination of punitive damages advocated by appellant would undermine the ability of states to regulate and enforce state laws governing unfair insurance practices.

Summary of Argument

States such as California have painstakingly established standards of conduct for insurance claims handling and the consequences for an insurer's failure to abide by those standards. *State regulation*, by statute and case, *is due process* because an insurer knows that in order to do business in the state certain standards apply and certain consequences may follow if the insurer refuses to operate by those standards. Due process is essentially notice and an opportunity to be heard. States which have laws governing unfair claims practices and apply punitive damages according to particular limiting criteria in a judicial forum provide due process.

As a nationwide fact, punitive damage awards are not excessive. As to this particular case, there is no factual record by which "excessiveness" can be reviewed by this court, and no state court has reviewed the issue.

A.

PUNITIVE DAMAGES ARE NOT "EXCESSIVE FINES" AND DO NOT VIOLATE DUE PROCESS

Punitive damages are not excessive fines, empirically or legally. Empirical data shows that the incidence of punitive damage awards is extremely small and the amounts awarded are not high. As concluded in *Empirical Patterns in Punitive*

Damage Cases: A Description of Incidence Rates and Awards, prepared by the American Bar Foundation for the 1987 Law and Society Association annual meeting in Washington, D.C. on June 12-14, 1987, punitive damage awards are not routinely given, nor are they applied in a haphazard, inconsistent or unfair manner.[1]

As a legal issue, an award of punitive damages in any given case is reviewed several times by different judges and by several different tribunals according to the laws of each state. Any lawsuit in which punitive damages are awarded invariably results in the exercise of the following civil judicial review: demurrer, motion to strike, summary judgment, motion for directed verdict, motion for judgment notwithstanding the verdict, motion for new trial, conditional motion for new trial (and remittitur), lengthy and protracted appeals to intermediate appellate courts, and to the State Supreme Court and, in some instances, request for and review by the United States Supreme Court. Therefore, an award of punitive damages is never based on the sole caprice of a jury acting under passion and prejudice, but is subject to review by more judges than the 12 jurors rendering the verdict.

Appellant's principal compiaint centers upon notice. Bankers Life declares "if the legislature of Mississippi, rather than the Supreme Court of Mississippi, had determined that conduct of the type involved in this case was worthy of criminal punishment, the legislature presumably would have made that determination in a statute which would have given notice with reasonable specificity of the conduct prohibited and would simultaneously have proscribed a range of punishment . . . ".

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[1] Stephen Daniels and Joanne Martin prepared *Empirical Patterns in Punitive amage Cases: A Description of Incidence Rates and Awards* for the American Bar Foundation and presented the study to the 1987 Law and Society Association annual meeting, in Washington, D.C. on June 12-14, 1987 [hereafter A.B.F. Study]. Much of the study was published, *see* Daniels & Martin, *Jury Verdicts and The "Crisis" in Civil Justice*, 11/3 Just. Sys. J. 321 (1986).

Appellant's Brief, p.32. As discussed below, many states have specifically addressed these two concerns, the standard of conduct and the consequences for failing to meet the standard, in the insurance business context. States, such as California, with statutorily mandated fair claims practices and specific guidelines and limitations for an award of punitive damages do not violate due process by assessing excessive fines.

1.

STUDIES BY THE AMERICAN BAR FOUNDATION SHOW THAT PUNITIVE DAMAGE AWARDS ARE NOT EXCESSIVE

Appellant, Bankers Life, argues that the punitive damage award in this case is excessive as part of its argument that all punitive damages are, by definition, excessive fines.

There is no factual record upon which to evaluate the punitive damage award in the instant case. *See "B" infra* p. 17. However, empirical studies show the overall incidence of punitive damage awards is small, the types of cases in which these damages may be awarded are rare, and the actual amounts assessed are low.

A 1987 American Bar Foundation study reviewed punitive damage awards in forty-two counties in ten different states during the early 1980's and five counties in two neighboring states for 1970 through 1985. A.B.F. Study p.3 The information was gathered from local jury verdict reporters with an eye to obtaining a regional balance and comprehensive information with a cross-section of different parts of the country, different size metropolitan areas, different social economic makeup and under the application of differing laws. *Id.* at 4. The report concludes:

> In general, then, while plaintiffs tend to fare well — winning more than fifty percent of the time — plaintiffs are not likely to win very high awards. Interestingly this runs contrary to much of the rhetoric of tort reform which portrays awards as being typically high.

Id. at 7.

* * *

> In no site did as much as 15% of all reported verdicts or 25% of all successful verdicts include an award for punitive damages.

Id. at 9.

* * *

> Median punitive [damage] awards in most sites are modest (below $50,000) . . . Medians in 27 of the 42 sites are $50,000 or less, and in just over half the counties (22) are below $25,000.

Id. at 6-7.

The following graphs are reproduced from the American Bar Foundation study:

OVERALL PATTERNS IN REPORTED PUNITIVE DAMAGE CASES

Site	n	% of All Reported Verdicts	% of All Successful Verdicts
ARIZONA (SUPERIOR COURT)			
Maricopa (1981-1985)	150	8.5	14.6
CALIFORNIA (SUPERIOR COURT)			
Alameda (1981-1984)	16	5.9	10.3
Fresno (1981-1984)	7	5.8	11.9
Los Angeles (1981-1984)	122	5.5	9.8
Sacramento (1981-1984)	20	6.6	11.8
San Diego (1981-1984)	6	2.4	5.0
San Francisco (1981-1984)	40	7.5	12.6
GEORGIA (SUPERIOR COURT)			
Cobb (1982-1984)	11	12.2	19.0
DeKalb (1982-1984)	18	7.5	12.9
Fulton (1982-1984)	38	7.1	12.1

ILLINOIS (CIRCUIT COURT)			
Cook (1981-1985)	68	1.6	2.8
DuPage (1981-1985)	9	2.1	3.7
Kane (1981-1985)	5	2.9	4.8
Lake (1981-1985)	6	2.0	3.4
McHenry (1981-1985)	2	3.3	6.1
Will (1981-1985)	7	2.4	3.9
Winnebago (198101985)	7	4.7	8.0
KANSAS (DISTRICT COURT)			
Johnson (1981-1985)	11	3.5	6.7
Wyandotte (1981-1985)	9	3.1	5.1
MISSOURI (CIRCUIT COURT)			
Clay (1981-1985)	15	14.4	24.2
Jackson (1981-1985)	109	12.2	22.0
Platte (1981-1985)	5	10.6	17.9

OVERALL PATTERNS IN REPORTED PUNITIVE DAMAGE CASES

Site	n	% of All Reported Verdicts	% of All Successful Verdicts
NEW YORK (SUPREME, CIVIL, COUNTY)			
Bronx (1981-1984)	0	---	---
Erie (1983-1984)	0	---	---
Kings (1981-1984)	4	0.5	0.8
Monroe (1983-1984)	4	4.3	7.0
Nassau (1981-1984)	8	1.3	3.1
New York (1981-1984)	22	2.1	3.3
Onondaga (1983-1984)	1	1.5	2.5
Queens (1981-1984)	2	0.5	0.9
Richmond (1981-1984)	0	---	---
Suffolk (1981-1984)	8	2.0	3.6
Westchester (1981-1984)	3	1.3	3.2
OREGON (CIRCUIT COURT)			
Multnomah (1984-1985)	11	3.6	6.4

TEXAS (DISTRICT, COUNTY)			
Dallas (1981-1985)	142	6.7	13.3
Harris (1981-1985)	156	7.8	14.0
WASHINGTON (SUPERIOR COURT)			
King (1983-1985)	0	---	---
Pierce (1983-1985)	0	---	---
Skagit (1983-1985)	1	5.3	6.7
Snohomish (1983-1985)	1	0.9	1.5
Spokane (1983-1985)	0	---	---
Yakima (1983-1985)	1	1.4	2.2

MEDIAN PUNITIVE DAMAGE AWARDS IN REPORTED CASES FOR SITES WITH 10+ CASES (in 1985 DOLLARS)

Site	Median
ARIZONA (SUPERIOR COURT)	
Maricopa (1981-1985)	$26,450
CALIFORNIA (SUPERIOR COURT)	
Alameda (1981-1984)	$89,070
Los Angeles (1981-1984)	$103,600
Sacramento (1981-1984)	$108,000
San Francisco (1981-1984)	$75,340
GEORGIA (SUPERIOR COURT)	
Cobb (1982-1984)	$10,800
DeKalb (1982-1984)	$6,820
Fulton (1982-1984)	$21,252
ILLINOIS (CIRCUIT COURT)	
Cook (1981-1985)	$19,184
Urban Ring	$24,000
KANSAS (DISTRICT COURT)	
Johnson (1981-1985)	$5,570

MISSOURI (CIRCUIT COURT)	
Clay (1981-1985)	$32,400
Jackson (1981-1985)	$14,788
NEW YORK (SUPREME, CIVIL, COUNTY)	
New York (1981-1984)	$51,309
OREGON (CIRCUIT COURT)	
Multnomah (1984-1985)	$26,000
TEXAS (DISTRICT, COUNTY)	$26,500
Harris (1981-1985)	$25,000

2.

DUE PROCESS IS SATISFIED WHEN STATE LAW DEFINES PROHIBITED INSURANCE PRACTICES AND THE STANDARDS BY WHICH PUNITIVE DAMAGES WILL BE IMPOSED WHEN AN INSURER CONDUCTS ITS BUSINESS CONTRARY TO STATE LAW

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945) has declared that *state* regulation of insurance claims practices is in the public interest and that the silence of Congress on the subject was not to be interpreted as invalidating state laws regulating and taxing insurance. The McCarran-Ferguson Act reflects express federal legislative intent to confer insurance regulation upon each of the states. 15 U.S.C. § 1012(b).

In response to the deliberate absence of federal regulation of insurance claims practices, various states have made careful efforts, both legislatively and judicially, to deter unfair and unscrupulous insurance claims practices. Many of the regulatory efforts of the various states are characterized by specific, predictable and flexible statutes which achieve the intended purpose and goal of preventing unfair claims practices.[2]

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[2] Following are a few samples:

In Texas, Insurance Code Article 21.21, § 16(b)(1) provides that the amount of *actual* damages obtained by an insured against an insurer for violation of the Deceptive Trade Practices and Consumer Protection Act (Bus. & Com. Code § 17.46) or the unfair practices set forth in the Insurance Code *must* be trebled if the violation was found to be a "knowing" violation.

In Montana, the Insurance Commissioner may, after a hearing, impose an administrative fine of no more than $1000.00 for each violation of the Unfair Practices Act. (Mont. Code Ann. § 33-18-233.) In addition, the Commis-

(continued)

The Federal Government is not in a position to put limits on punitive damages just as it is not in a position to put limits on the availability of compensatory damages. As shown in the discussion above, jury verdicts depend upon the sensibilities and values in the regions where the injury occurs. The appropriateness of a jury verdict depends very much on local economy, local culture and the appropriate liability analysis in the law of each jurisdiction. Appellant does not argue that criminal sentences should be uniform nationwide to avoid a claim that one state or another is excessive because the Constitution must recognize regional differences and the state's ability to govern its citizens. This argument would be unsuccessful in either criminal or civil law. Since punitive damages are not "excessive" as a matter of fact, the remaining question of due process depends upon notice.

It is abundantly clear that the development of liability for punitive damages, especially in the insurance context, has been widely felt and commented upon by the insurance industry. *See* Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613 (1979). The insurance industry

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(ftn. continued)
sioner may issue a desist order (Mont. Code Ann. § 33-18-1004.) Violation of that order will subject the insurer to a civil penalty of $1000.00 per day, for a maximum of $10,000.00. (Mont. Code Ann. § 33-18-1005.)

In Iowa, the Insurance Code provides that the Commissioner may impose a penalty of $1000.00 per violation of the rules under the Code, to an aggregate of $10,000.00. However, if the violator knew or reasonably should have known the rules were being violated, the penalty may be imposed at the rate of $5,000.00 per violation to an aggregate of $50,000.00. (Iowa Ins. Code § 523 C.13.)

The Louisiana Insurance Code provides that an insurer's failure to comply with the sections requiring prompt payment of health, accident and disability benefits shall be liable to the insured for double the benefits owed during the delay and attorneys' fees to be determined by the court. (La. R.S. 22:657.)

has long been aware of the particular requirements for good claims practices and the probable consequences for bad claims practices: "The failure to make prompt settlement of amounts admittedly owing can result in large punitive damage awards for oppression and also subject the insurer to a charge of unfair claims practices" and insurers are well aware that their license may be revoked and that punitive damages are often related to the financial worth of the defendant. Levit, *Punitive Damages Today*, 1974 INS. L.J.483. The entire insurance industry has reacted to the development of insurance law and the incidental application of punitive damage awards in California by changing claims practices. *See* Levine, *supra*, at p. 626. Not only has the insurance industry reacted to the California verdicts, it has reacted with specificity and addressed particular practices in order to avoid future punitive damage awards. *Id.* Clearly the industry is on notice.

Insurance companies operating in California know what the standards of fair claims practices are and what the consequences for failing to meet these standards will be. California Insurance Code Section 790.03 sets out, specifically, what are considered unfair claims practices.[3] California Civil Code

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[3] The California Insurance Code section setting out prohibited practices and upon which punitive damage claims are based is specific:

"§ 790.03 Prohibited acts:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. . .

(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(4) Failing to affirm or deny coverage of claims within a

(continued)

Section 3294 states that punitive damages may be awarded in

(ftn. continued)
reasonable time after proof of loss requirements have been completed and submitted by the insured.

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.

(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent, or broker.

(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.

(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

(14) Directly advising a claimant not to obtain the services of

(continued)

cases involving malice, oppression or fraud.[4] Lastly, the California Book of Approved Jury Instruction sets out the particular criteria for a punitive damage award.[5]

(ftn. continued)
an attorney.

(15) Misleading a claimant as to the applicable statute of limitations."

4 California Civil Code § 3294 allows punitive damages:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

5 California juries are instructed:

"If you find that plaintiff suffered damage as a proximate result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant, for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

['Malice' means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [carried on by the defendant with a conscious disregard for the] [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.]

['Oppression' means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.]

['Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(continued)

Insurance companies doing business in California receive due process because they are well aware of the standard of conduct required and the consequences for failing to meet that standard.

B.

THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER A CLAIM OF UNCONSTITUTIONALITY RAISED FOR THE FIRST TIME AFTER A JURY TRIAL, AND WHERE THE STATE COURT HAS NOT RULED ON THE ALLEGED CONSTITUTIONAL ISSUE

As appellant's jurisdictional statement establishes, it first raised the constitutional questions with respect to the issue of punitive damages only *after the trial was over, and on a motion for new trial.* Appellant's Jurisdictional Statement, pp. 10-11. *See also* Appellant's Brief, pp. 1-2. The case proceeded to trial, and the jury heard all the evidence and appellant never claimed any of the constitutional rights now asserted, nor is there anything to show that appellant ever

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(ftn. continued)

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

If you decide to award punitive damages to plaintiff against defendant, you shall state the amount of punitive damages separately in your verdict." B.A.J.I. *California Approved Jury Instructions, Civil,* 14.71.

requested jury instructions with respect to the constitutional issues it now raises.

Appellant's excuse for failing to make such a claim was that it "could not have known that punitive damages, if awarded at all, would be excessive until after the jury's verdict was rendered." Appellant's Jurisdictional Statement pp. 10-11. Appellant tacitly admits that it kept to itself its constitutional claim *in order to gamble on the verdict* and get two bites of the apple.

We respectfully submit the law is clear that a litigant may not suppress its claims of constitutional rights until a trial is over and then — dissatisfied with the verdict — assert such claims in an attempt to force a time-consuming and expensive repetition of the proceedings.

We respectfully submit, under 28 U.S.C. section 1257, that there is no jurisdiction under these circumstances. Thus, in *Webb v. Webb*, 451 U.S. 493 (1981) this court had before it a Writ of Certiorari from the Georgia Supreme Court. This court dismissed the writ:

> *We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court.* This court has frequently stated that when 'the highest state court has failed to pass upon a federal question, *it will be assumed that the omission was due to want of proper presentation in the state courts* unless the aggrieved party in this party in this Court can affirmatively show the contrary.' [Citations]

451 U.S. pp. 495-496 (Emphasis added) (*See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, fn.3 (1983).

The Mississippi Supreme Court did not even mention appellant's constitutional claims, let alone rule on these issues. We

therefore respectfully submit that appellant's claim of a federal constitutional issue, first presented on a motion for new trial is untimely. "Ordinarily, the federal issue is presented too late if it is first raised in a motion for new trial." 16 Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure* (1977), section 4022, p. 701. This court has so held in *Barbour v. State of Georgia*, 249 U.S. 454, 460 (1919), a decision which was cited with approval in *Yakus v. United States*, 321 U.S. 414, 444 (1944) and has never been disapproved or overruled.[6]

The reason for the rule requiring that federal issues be timely presented to the state court confirms that appellant's failure to do so is fatal to its claim of jurisdiction. As this court stated in *Webb v. Webb, supra*, the requirement of timely preservation affords the parties the opportunity "to develop the record necessary for adjudicating the issue"; it permits the state courts to exercise their authority to construe state statutes so as to avoid or obviate federal constitutional challenges; insures that if there are independent and adequate state grounds that would determine the federal issue they will be identified

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6 Although appellant claims — (Jurisdictional Statement pp.10-11) that *Chambers v. State of Mississippi*, 410 U.S. 284 (1973) may be an exception to this rule (16 Wright, Miller, Cooper and Gressman, *supra*, p. 702, fn. 23), in *Chambers*, a criminal case, *the defendant objected at the trial* to the individual evidentiary rulings. At the conclusion of the trial, defendant claimed that the cumulative effect of these rulings was a denial of due process, and this court held that this claim could not have been raised and ruled upon prior to the conclusion of defendant's evidentiary presentation. 410 U.S. at p. 290, fn.3. Moreover, this court observed that the state had never claimed that the constitutional issue was not raised. *Ibid.* *See* 16 Wright, Miller, Cooper and Gressman, *supra*, p.702.

and acted upon in an authoritative manner[7] and allows state tribunals to adjudicate the federal claims, which may thereby "obviate any reason" for this court to give "plenary consideration to the case." 451 U.S. at 500.

Similarly, in *Illinois v. Gates*, 462 U.S. 213 (1983), this court refused to consider a constitutional claim not pressed or passed upon in the state court, noting that questions not raised below are those on which the record is very likely to be inadequate since it was not compiled with the constitutional questions in mind. 462 U.S. at 221.

These considerations are particularly applicable to the case at bar. As we understand it, appellant claims that the present proceeding violated the excessive fines clause in the United States Constitution in the following respects: (1) The punitive damage award was "grossly disproportionate to actual damages"; (2) it was "vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous improper business activities" and; (3) it was imposed under a newly formulated standard of conduct and applied retrospectively. Appellant's Jurisdictional Statement, p. 16.

Obviously, each of these claims could and should have been ruled upon by the state courts. Appellant could have, for example, requested that the jury be instructed in accordance with its claim that the constitution requires that a punitive damage award not be "grossly disproportionate" to the actual damages. Appellant argues, citing *Solem v. Helm*, 463 U.S. 277 (1983) that certain factors determine whether a criminal sentence is constitutionally excessive. *See* Appellant's Brief at 32. Had appellant raised this issue in the trial court, the trial court could have considered the presence or absence of

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[7] Thus, in the present case there is reason to believe that Mississippi state law prohibits excessive fines in the same manner as the United States Constitution. Simply put, the majority of the Mississippi Supreme Court did not believe the award was excessive. As discussed above, appellant wishes this court to review this essentially factual issue on an empty record.

these factors in the present case, make evidentiary rulings accordingly and give appropriate jury instructions. Instead, appellant asks this court to adjudicate these factual questions absent any factual record at trial.[8]

We therefore respectfully submit that this court should be kind jurisdiction in this case, in view of the inadequate record due to appellant's failure to raise the constitutional issue

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[8] Appellant's brief itself states that the failure to raise the issue at the trial deprives the parties of "the opportunity to develop the record necessary for adjudicating the issue." *See Webb v. Webb, supra.* There was no evidence with respect to other Mississippi criminal statutes that might be applicable or analogous and no evidence or argument as to whether Mississippi law provided this relatively low fine in its criminal statute because Mississippi did not wish to consume the scarce resources of government and law enforcement and believed that private enforcement through punitive damage awards as a deterrent made it unnecessary to enact criminal statutes assessing large fines. Appellant has discovered a new statute not mentioned in its jurisdiction statement, which it claims demonstrates that the punitive damage award is beyond any criminal penalty. Appellant's Brief at p. 14. Appellant claims that if Mississippi had prosecuted it for violating that statute, (Mississippi Code Ann. § 83-5-33 (1972)) it would have been entitled to a trial with "the full panoply of procedural safeguards accorded to criminal defendants" Appellant's Brief at 14 — safeguards which appellant never asked for in this case until it was too late to provide them.

Moreover, appellant omits to mention that Mississippi law permits the Insurance Commissioner to charge insurance companies with undefined acts of unfair competition and practices (Mississippi Code Ann. § 83-5-45 (1972)), to issue cease and desist orders, and to punish violators of such orders not only with the small fines cited by appellant *but also by revoking their license to do business in Mississippi* (Mississippi Code Ann. § 83-5-49 (1972)). In the light of these penalties, it is doubtful that the punitive damage award exceeds the criminal sanctions but here, again, this is a factual issue that could have been resolved had appellant timely raised it.

during the trial.[9]

This issue is of more than technical interest. State legislatures and courts work long and hard to make laws, enforce them and adjudicate disputes arising from the application of those laws. Insurers and others defending punitive damage claims often refrain from raising constitutional issues for tactical reasons.[10] To permit appellants to preserve the excessive fines issue by raising it post-trial will result in undermining the Mississippi legislature and judicial system and the proliferation of litigation, including appeals and petitions to this court.

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9 Even if appellant had raised one of the two alleged constitutional questions in timely fashion this does not bestow jurisdiction on this court with respect to the other questions. *See, e.g., Illinois v. Gates, supra,* 462 U.S. 213, and *Exxon Corp. v. Eagerton, supra,* 462 U.S. 176, where this court refused to decide the questions that had not been timely presented, but did decide other questions which had been timely presented.

10 The most common example is with respect to a contention that the burden of proof should be the criminal burden of beyond a reasonable doubt. Civil defendants are reluctant, as a matter of tactics, to receive an instruction to that effect in many cases, because punitive damage cases also involve compensatory damage issues. Defendants often believe that instructing the jury on a higher burden of proof on one issue disadvantages them before juries on the issue with a lesser burden of proof, and they deliberately elect to gamble on the punitive instruction to better their chances on the compensatory claim.

We can only speculate on the reasons that appellant did not raise the issue in the trial court at bar. We are confident, however, that it was not because its counsel were unaware of this possible issue. Appellant's claim that it could not have known that punitive damages would be of a size it considered excessive (Appellant's Jurisdictional Statement at 10) is, we respectfully submit, fatuous. Appellant always knew of the possibility that an award it could profess to be excessive might be assessed against it. This is demonstrated in its own "jurisdictional statement" wherein it states that the present decision is not "an aberration" (Jurisdictional Statement at 19), *i.e.*, it is not the type of result that could not be anticipated.

C.

THIS COURT SHOULD DISMISS THIS CASE AS MOOT IN VIEW OF *PILOT LIFE v. DEDEAUX*

In *Pilot Life Ins. Co. v. Dedeaux*, ___ U.S. ___, 107 S.Ct. 1549 (1987) and *Metropolitan Life Ins. Co. v. Taylor*, ___ U.S. ___, 107 S.Ct. 1542 (1987), this court held that the Employee Retirement Income Security Act 29 U.S.C. section 1001, *et seq* (1974) preempted a Mississippi common law cause of action for bad faith arising out of an insurance company's improper processing of a claim for benefits under an ERISA-regulated employee benefit plan.

The present case probably involves such a plan, since the subject insurance policy was a group accident policy purchased by appellee's employer. *See* Appellant's Jurisdictional Statement at p. 5, Opinion of the Mississippi Supreme Court, 483 So.2d 254, 256.[11] It has been held that whether such a policy is governed by ERISA is a question of fact. *See Donovan v. Dillingham*, 688 F.2d 1367 (11 Cir. 1982). *Compare Taggart Corp. v. Life and Health Benefits Admin.*, 617 F.2d 1208 (5th Cir. 1980) *cert. den. sub. nom. Taggart Corp v. Efros*, 450 U.S. 1030 (1981); *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692 (7th Cir. 1977).

If ERISA, in fact, applies to the subject insurance policy, the constitutional controversy is moot.[12]

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11 This Court's decision in *Pilot Life v. Dedeaux* issued after the Petition for Writ of Certiorari was granted in this case.

12 In view of the significance of the *Pilot Life* decision and the vast number of ERISA cases pending and which would be affected by the holding in this case, we believe that this cause should be dismissed as improvidently granted. Furthermore, although ordinarily it could be said the appellant has waived the point by failure to raise it, in the present case, appellant's failure

(continued)

CONCLUSION

The judgment of the Mississippi Supreme Court should be affirmed or, in the alternative, this court should decline to exercise jurisdiction and dismiss.

Respectfully submitted,

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(ftn. continued)
to raise the point involves extraordinary circumstances. It may be ascribed to the desire of the insurance industry to secure a favorable decision on the claimed constitutional issue. In sum, appellant may be seeking to confer jurisdiction on this court by concealing an issue which should be properly decided by the lower courts. Appellant's strategy may be to persuade this court to reverse this case on the punitive damage issue, after which the case will be placed at large for further proceedings. When it is returned to the lower court, appellant can then seek to file pleadings raising the ERISA defense. While this strategy is ingenious, under the circumstances of this case, it amounts to an improper attempt to secure an advisory opinion from this court.